Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

NICK PREMRATANANONT,

Petitioner,

vs.

SOUTH SUBURBAN PARK AND RECREATION DISTRICT, a Special District,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court, in a decision affirmed by the appellate court, erred in holding that Plaintiff was not constructively discharged, because working conditions were not sufficiently intolerable, without considering the evidence of Plaintiff's emotional state as objectively reported by Dr. Emrick's report?

2. Whether the district court, in a decision affirmed by the appellate court, erred in holding that Plaintiff must provide direct evidence of discrimination in order to establish constructive discharge, when Plaintiff is proceeding under the McDonnell Douglas burden shifting analysis?

3. Whether the district court, in a decision not remarked upon by the appellate court, erred in declining to exercise supplemental jurisdiction on Plaintiff's second claim for race and ethnic discrimination in violation of the Colorado Anti-Discrimination Act, Colorado Revised statues § 24-34-402?

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OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is scheduled to be published, and appears in Appendix A, hereto. The oral ruling of the United States District Court for the District of Colorado is not published, and appears in Appendix B, hereto.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 2000e-5(f)(3), and entered judgment in this case on March 6, 1997. (App. B, at 8a). The Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and entered its order affirming the district court's judgment on April 30, 1998. (App. A, at 1a-7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

(1) 42 U.S.C. § 2000e-2(a)(1) (1994 & 1995 Supp.), is pertinent to this litigation and states in relevant part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual[s] race, color, religion, sex or national origin . . .

(2) 28 U.S.C. § 1367(3) (1994 & 1995 Supp), is pertinent to this litigation and states in relevant part:

> The district court may decline to exercise supplemental jurisdiction over a claim . . . if
>
> (3) the district court has dismissed all claims over which it has original jurisdiction . . .

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner filed this suit on February 26, 1996, alleging claims of racial and ethnic discrimination in violation of the Title VII, 42 U.S.C. § 2000e *et seq.*, and the Colorado Anti-Discrimination Act against South Suburban Park and Recreation District.* The District filed its answer on March 18, 1996. Following discovery, the District filed a motion for summary judgment on December 6, 1996. This motion alleged that Petitioner Premratananont had not established a prima facie case of discrimination because he could not establish that his working conditions were sufficiently intolerable to warrant his involuntary resignation. Additionally, this motion asserted that there was insufficient evidence that the adverse employment actions were based upon Premratananont's race and national origin.

On January 29, 1997, the district court judge granted the District's motion for summary judgment on the grounds that the evidence "is insufficient to show that the Defendant made working conditions so difficult that a reasonable person in Plaintiff's position would feel compelled to resign." (App. D, at 19a). The court went on to decline the exercise of supplemental jurisdiction on the remaining claim under the Colorado Anti-Discrimination Act. (*Id.*, at 20a).

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* [Hereinafter, "District" or "Defendant"].

The petitioner appealed to the United States Court of Appeals for the Tenth Circuit. He argued that the district court's grant of summary judgment was in error, that he had made a prima facie case, and that the court erred in declining to exercise supplemental jurisdiction.

The appellate court never addressed the issue of supplemental jurisdiction. It held, however, that Plaintiff did not establish a prima facie case for discrimination because he did not demonstrate that he was subjected to harassment which was based upon his race or national origin and that the working conditions were not sufficiently intolerable to establish a constructive discharge. (App. A, at 1a-7a).

B. Statement of the Facts

Appellant Nick Premratananont is Asian, born in Bangkok, Thailand to parents of Chinese descent. He lived there for a number of years, attending school in Thailand through technical college. He began his employment with the District in July, 1981 as a Maintenance Specialist I. In 1984 and again in 1988 or 1989, he was promoted. This last promotion was to Lead Facility Maintenance Specialist at the Goodson Recreation Center. This is the position he held at all material times during the discrimination complaints at issue. These promotions were a result of his demonstrated competence in job performance and were initiated by the District, without the necessity of Premratananont's officially applying for such positions.

Premratananont performed his duties for more than a decade at the Goodson Recreation Center, which is located in the center of the District, and is described by the Manager of Recreation Facilities, Kevin Green, as having classrooms, a pool, an indoor running track, a gymnasium, gymnastic center, several racquetball courts and a number of rooms with exercise

equipment. Additionally, this facility had two steam rooms, three hot tubs and four locker rooms within Premratananont's responsibility.

1. *Nick Premratananont Was Treated Disparately By His Immediate Supervisor, Kim Lathrop.*

In June, 1994, Kim Lathrop became Premratananont's supervisor. From the beginning she treated him differently from the other employees. While Lathrop demanded Premratananont perform a list of tasks by certain deadlines with respect to the Goodson Center, no such demands were ever made on Ernie Blevins, a similarly situated non-minority employee at the Sheridan Recreation Center. The vacation schedules had been set earlier in the year by Lathrop's predecessor, Bob Pfieffer, and Mr. Blevins was permitted to keep his dates. This was not true for Premratananont, who was not permitted to keep his dates. She made requests for Mr. Blevins and Mr. Fisher to walk around the Goodson Center, the center where Plaintiff worked, for inspection and training of Lathrop but did not invite Premratananont to participate. Lathrop flat out told Premratananont that she trusted Blevins more than she trusted him, and she absolutely refused to explain her reasons for that statement. Neither did she attempt to justify that remark by criticizing Premratananont's performance. Added to this, Premratananont was singly required to obtain Lathrop's personal permission to see his physician, but no such demand was made on Blevins and other employees.

On September 13, 1994, Premratananont met with Lathrop to discuss his concerns about her disparate treatment of him. At no time during this meeting did Lathrop discuss concerns she had regarding Premratananont's performance. This is the meeting where Lathrop told Premratananont that she trusted Blevins more than she trusted him, but would neither elaborate nor discuss the comment.

2. *Premratananont Was Not Interviewed For The Position Of Supervisor Of Preventative Maintenance.*

On, or about, September 11, 1994, the District posted the position for Supervisor of Preventative Maintenance and Premratananont timely submitted his application for the position. The requirements for the position were listed in the posting. The position required:

> Any combination equivalent to four years of skilled and semi-skilled labor experience that is inherent to park or related grounds and facility maintenance and construction. Electrical, plumbing, and/or swimming pool maintenance experience preferred. Two years supervisory experience as lead man or foreman. Valid Colorado Drivers license. Hazardous material training, certified pool/SPC Operator.
>
> Premratananont met all of these qualifications.

He held the requisite licenses and certificates listed in the position description, and Greene, the person responsible for the decisions, knew this. Moreover, he exceeded the minimum qualifications since he had over thirteen years of experience in grounds and facility maintenance and construction at South Suburban alone. Additionally, Premratananont gained considerable experience in budgeting, purchasing, electrical, plumbing, heating, air conditioning and swimming pool maintenance as called for in the position description. He has a valid Colorado Driver's License, became a Certified Pool Operator in 1993 and had received training in hazardous material. Indeed, on fire safety, the Goodson Facility received a fire safety award at a material time to the issues presented and fire safety was part of Premratananont's responsibility.

Because of the skill level at which he had been performing over these past thirteen years, his previous supervisor, Bob Pfeiffer, encouraged Premratananont to apply for this position. Pfeiffer believed that it would be in the best interests of the District for Premratananont to be selected.

Nevertheless, South Suburban District did not even interview Premratananont for this position of Supervisor of Preventative Maintenance because it determined he was not qualified. He was viewed as unqualified since he did not have multi-site supervision experience, experience which was not mentioned in the posting. Additionally, Kevin Greene, the person responsible for the decisions on who to, and who not to, interview, spoke to Lathrop who informed him that she was having problems with Premratananont.

The District offers equal opportunity in employment and advancement of employees, it has an employee Handbook, which contains an "Equal Opportunity Employment" policy, a "Job Posting" policy, and also a procedure on Employee selection. Plainly, Greene was responsible for the execution of these policies. Greene was without knowledge as to whether or not there were any Asians in supervision in 1994 and made no effort to ascertain that fact. Greene testified that he did not know that Premratananont was Asian or was from Bangkok or Thailand; however, he testified that Premratananont "had the characteristics that remind me of an Asian." Additionally, Premratananont discussed his Asian status with supervisors of the District and it was noted on their various forms.

Don Petit, Gerald Greitzenauer, Robert Jacobs, and Robert Elissha of the white race were granted an interview. Premratananont, an Asian, was not. Don Petit had only been with the District for 18 months at the time of his interview, while Premratananont, as we have seen, had been with the

District for thirteen years. Furthermore, unlike Premratananont, apparently Petit did not meet the minimum posted requirements since the evidence fails to establish that he held the pool certification required. Neither Gerald Geitzenauer, Robert Jacobs, nor Robert Elisha had any experience working for the District in maintenance, while Premratananont had such experience. One of the members of the interview panel for the job at issue, Andy McRoberts, Aquatics Supervisor, told Premratananont that he was more qualified than some of the people interviewed and that he did not know Premratananont applied. In fact, although the interviewers reviewed the applications for the position, Premratananont's application was never before them.

3. *The Events Of September 29, 1994.*

After submitting his application for the Supervisor of Preventative Maintenance, upon the recommendation of Pfieffer, Premratananont told Lathrop that he was applying for the position. She did not make any reference to alleged performance problems to Premratananont at that time. She did tell Joann Phillipp that she would make sure that Premratananont would not get an interview, despite Ms. Phillipp's reminder to Lathrop that Premratananont exceeded the required qualifications.

Early on September 29, 1994, Premratananont asked Lathrop why he was not one of the applicants being interviewed. She replied that she was not aware that the interviews were taking place so quickly and would speak to Greene about the issue. Later, Premratananont and Lathrop were in the Personnel Office meeting with Ms. Schillinger concerning the termination of an employee reporting to Premratananont and he inquired of Lathrop if she had spoken to Green about why he was not being interviewed. Lathrop acknowledged that she had spoken to Greene that morning, but not about Premratananont's inquiry. At approximately this same moment, Ms. Schillinger asked

Premratananont about certain of his qualifications for the position, i.e. whether he had a Certified Pool Operator Certificate and training in hazardous materials, and when he replied in the affirmative, Ms. Schillinger, touched his shoulder and stated, "Well, you'll just have to ask Kevin." Later that afternoon, Lathrop handed her Memorandum of September 29, 1994 to Premratananont stating that this memo was probably the reason why he was not selected for an interview.

This memorandum purportedly reiterated concerns Lathrop had regarding Premratananont and which they allegedly discussed at the meeting of September 13, 1994. The memo further threatened Premratananont with termination if he did not improve within 90 days. Of course, this was the very first time Premratananont had been told by anyone that there was a concern regarding his performance.

4. *Aftermath*

On October 4, 1994, Premratananont went on sick leave. Premratananont's expert witness opines that he suffered a Major Depressive Episode, a Panic disorder, and a stress disorder in the fall of 1994, requiring both hospitalization and treatment on an out-patient basis. The course of treatment section of his report dramatically demonstrates the severe emotional shock and distress caused by these events at work. More importantly, C. Emrick, Ph.D. states that these disorders were 100% caused by his work environment in being denied the chance at the promotion.

Because of his mistreatment, Premratananont was afraid to return because he did not know "what they'll do to me." Because of this fear, and the tremendous anxiety he was suffering, he was forced to quit on December 6, 1994, in order to be able to move on with his life.

SUMMARY OF ARGUMENT

The district court erroneously granted summary judgment in favor of Appellee on his Title VII case, and consequently, should not have declined to exercise supplemental jurisdiction on his remaining claim for discrimination under the Colorado Anti-Discrimination Act. Premratanaṅont established his entitlement to proceed, established each of the material elements of each claim or demonstrated that material issues of fact were in dispute such that the District was not entitled to summary judgment as a matter of law.

Both the district and appellate courts erroneously determined that Premratananont had not been constructively discharged because working conditions were not sufficiently intolerable. Neither opinion considered Dr. Emrick's expert report detailing the severe emotional distress Premratananont experienced. His emotional distress was so bad that he needed to be hospitalized, and Dr. Emrick found that this was a direct result of the conditions he experienced at work.

Additionally, the appellate court's opinion clearly required that Premratananont produce direct evidence of discrimination even though he was using the *McDonnell Douglas* burden shifting analysis. Obviously, since this burden shifting analysis is used only in those cases where there is no direct evidence of discrimination, this was an impossible burden for Premratananont to meet, and erroneous under the law.

Finally, since Premratananont's discrimination claims were erroneously dismissed on summary judgment, his state-law claims under the Colorado Anti-Discrimination Act should not have been dismissed for lack of supplemental jurisdiction.

STATEMENT OF STANDARD OF REVIEW

The review of a district court's grant of summary judgment is *de novo*, applying the same legal standard as the district court. *York v. American Tel. & Tel. Co.*, 95 F.3d 948 (10th Cir. 1996). The record is to be examined to determine if any genuine issue of material fact is in dispute and if it is determined that there is no such issue(s), the court must then determine if the substantive law was correctly applied. *Applied Genetics Int'l., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). As to the review of the record for genuine issues of material fact, this Court is to construe the pleadings and documentary evidence in favor of the Appellant who was the party opposing the motion. *Id.* However, to survive summary judgment, the nonmoving party cannot merely rest on its pleadings but must "make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

REASONS FOR GRANTING THE WRIT

I.

PLAINTIFF PRODUCED SUFFICIENT EVIDENCE OF INTOLERABLE WORKING CONDITIONS.

Under Title VII it is an unlawful form of discrimination to constructively discharge an employee because of his race, color, religion, sex or national origin. *See Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Greenberg v. Union Camp Corp.*, 48 F.3d 22 (1st Cir. 1995); *Allen v. Bridgeston/Firestone, Inc.*, 81 F.3d 793 (8th Cir. 1996); *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126 (4th Cir. 1995); *Joiner v. Ohio Dept. Trans.*, 949 F. Supp. 562 (S.D. Oh. 1996).

An employee is constructively discharged when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee is forced to quit. *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982). This is an objective inquiry. *Id.* Nevertheless, in order to ascertain whether this standard has been met, it is imperative that each case be considered in light of "its individual merits." *Id.* at 173.

The district court concluded, and the appellate court affirmed, that Premratananont had not been constructively discharged because they determined that his disparate treatment of a few months, combined with his failure to be interviewed for the position he applied for, did not establish intolerable working conditions. (App. A, at 1a-7a; App. D, at 12a-21a). The courts' orders completely fall to adequately consider the fact that not only was he not granted an interview, but his supervisor told another employee that she would make certain he was not granted an interview, lies were made up about his performance, as well as lies alleging that these problems had been discussed, and Premratananont was threatened with suspension *and* termination. Thus, the evidence demonstrates far more then simply a failure to offer an interview.

Additionally, the courts' rulings also failed to give any consideration to the tremendous psychological harm Premratananont suffered as a result of this abusive treatment. While not determinative, evidence of psychological harm is extremely relevant in determining whether working conditions are intolerable. *See, generally, Harris v. Forklift*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993). Thus, as competent, relevant evidence, it should not have been ignored by the lower courts. *See id.*; *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1153 (10th Cir. 1990).

Dr. Emrick's report sets out Mr. Premratananont's mental suffering for each of his visits with Dr. Emrick. The report described Premratananont's need for hospitalization, and later, his suicidal thoughts. Dr. Emrick's report is objective evidence of severe psychological disturbance. It cannot be discounted as self-serving, and it is clearly relevant evidence which increases the likelihood that Premratananont's working conditions were objectively intolerable Fed. R. Evid. 401. Therefore, as competent relevant evidence, it should have been considered by the lower courts. *See, generally*, *Harris v. Forklift*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993). *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1153 (10th Cir. 1990).

This case is very similar to the *Irving* case. In that case, the Plaintiff, a black male, was also passed over for promotion in favor of a white employee. Additionally, the plaintiff was lied to about being paid the same as the white employee, he was required to perform laborer work as well as his supervisory duties, he was wrongfully blamed for problems for which he was not responsible, and finally, he was passed over for raises. *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982). Thus, while none of these actions, standing alone, may have been sufficient to establish a viable claim of constructive discharge, standing together reasonable minds could determine that the Plaintiff was forced to quit.

The same is true of the present situation. Looking at the totality of the circumstances, and all of the disparate treatment, the District's manufactured evidence regarding his performance, the fact that not only was he not given an interview, but that the interviewing panel was not even given the opportunity to consider his timely application, and when he requested information about this he was presented with a list of lies about

his performance and lies about discussions of these alleged problems, threatened with termination if he did not improve, and that he suffered severe psychological harm, demonstrate that no reasonable person should be required to remain in such an obviously hostile and abusive work environment where the object was to sabotage Premratananont's career. Under these circumstances, it is unreasonable to expect him to remain for further harassment and termination. This is especially true given that he needed hospitalization due to his severe emotional distress and the effects this distress was having on him and his thought processes, as detailed in Dr. Emrick's report. *See American Sheep Industry Ass'n*, 981 F.2d 1569, 1573-74 (10th Cir. 1992).

Nevertheless, both the district court and the appellate court asserted that Petitioner failed to establish that he was subjected to working conditions that were so intolerable that a reasonable person would feel forced to resign. (App. Ord. at 5; Dist. Ct. Ord. at 12:1-8). In reaching this decision, neither court apparently considered the evidence presented by Dr. Emrick's expert report which objectively detailed Petitioner's emotional suffering.

Additionally, the fact that Petitioner did not complete the grievance procedure does not change the fact that working conditions were intolerable. Indeed, the evidence demonstrates that he could not complete it given the severe mental distress that he was suffering, and the intolerable conditions. Title VII does not require continuing to subject oneself to intolerable working conditions simply to complete an internal administrative grievance procedure. 42 U.S.C. § 2000e, *et seq.* (1994 & 1995 supp.). It is incongruous that Title VII would require an employee to continue to following such a procedure, despite objective evidence leading towards a mental breakdown, and such a requirement is nothing more than form over substance. *See Harris v. Forklift*, 510 U.S. 17, 23, 114 S. Ct.

367, 371, 126 L. Ed. 2d 295 (1993) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").

II.

THE TENTH CIRCUIT ERRED IN REQUIRING DIRECT EVIDENCE OF DISCRIMINATION IN ESTABLISHING A PRIMA FACIE CASE UNDER THE *McDONNELL DOUGLAS* BURDEN SHIFTING ANALYSIS.

It is clear from reading the Tenth Circuit's opinion that the court was looking for direct evidence in establishing a prima facie case of discrimination. (App. A, at 3a-5a, 7a). However, this was a case which relied upon the *McDonnell Douglas* burden shifting analysis. This analysis is used when there is a lack of direct evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 99 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973). The district court's order set out its understanding of the elements for establishing a constructive discharge claim.

> Plaintiff must show that (1) he belongs to a minority group; (2) he was doing satisfactory work and/or was qualified to do his job; (3) Defendant subjected him to working conditions that a reasonable person would view as intolerable, while not so treating members of a difference race or ethnicity; and (4) his position was filled with a non-minority.

(App. D, at 19a). *See also Cone v. Longmont United Hospital Ass.*, 14 F.3d 526, 529, (10th Cir. 1994); *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1533 (10th Cir. 1995).

Plaintiff established these elements. He is a minority, he was doing satisfactory work and/or was qualified to do his job,

as described in the preceding section his working conditions were intolerable while not so treating white employees, and his position was filled with a non-minority. (App. D, at 19a). Therefore, Plaintiff established a prima facie case.

Finally, that this hostile action was discriminatory and racially based may be proved by "persuading the court that a discriminatory reason, more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence." *United States Postal Service v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1483, 75 L. Ed. 2d 403 (1983).

However, the appellate court's opinion clearly required proof, at the prima facie stage, of direct evidence of discrimination. (App. A, at 3a-5a, 7a). This is an impossible burden when proceeding under the burden-shifting analysis because of the lack of direct evidence. If this were the law, then each case of constructive discharge discrimination proceeding under *McDonnell Douglas*, would automatically result in summary judgment for lack of discrimination.

In making his case of intentional discrimination, Premratananont has brought forward evidence of discrimination through circumstantial evidence. Thus, he has substantial evidence that the reasons for his disparate treatment prior to the application, for the District's failure to interview him, and for his alleged performance deficiencies were nonexistent, fabricated, and therefore, pretextual. Additionally the evidence herein demonstrates that Premratananont was, in fact, treated disparately from Mr. Blevins and other individual who were not Asian.

> When a plaintiff in a Title VII case [directly] proves that [discrimination] played a motivating part in an employment decision, the defendant may avoid a

> finding of liability only by proving by a preponderance of the evidence that it would have made the same decision [in absence of the discriminatory motive].

Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S. Ct. 1775, 1794-95, 104 L. Ed. 2d 268 (1989). Here, the policy was to look at the qualifications of the applicants by examining the Position Description. Nowhere in the District's answers to Interrogatories does it acknowledge that Don Petit, who was interviewed and selected for the position, held the pool certification required by the minimum qualifications for selection, yet he, a Caucasian, was interviewed while Premratananont, an Asian, was not. Other examples are itemized in the fact portion of the brief, including the fact that Premratananont was qualified for the position, that his non-selection was premised upon a pretextual factor not itemized in the Position Description, and that he was specifically lied to and performance deficiencies were fabricated as soon as he requested an explanation for his non-selection.

In *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1007-09 (10th Cir. 1990), *cert. denied*, 506 U.S. 907, 113 S. Ct. 302, 121 L. Ed. 2d 225 (1992), the Tenth Circuit concluded that evidence of an existing policy which itself constitutes discrimination is direct evidence of discrimination. Greene's actions herein, as the sole executor of the policy and manner in which he executed that policy is direct evidence of discrimination. *Also see Trans. World Airlines v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523 (1985); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1430 (10th Cir. 1985). Thus, the District's statements that Premratananont, who met all of these basic requirements, and was considered by his past supervisor to be the obvious choice for the position, was viewed as less qualified, clearly rings false.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993), the Court noted that "rejection of the defendant's proffered reason *will permit* the trier of fact to infer the ultimate fact of intentional discrimination." (Emphasis in original). In *Randle v. City of Aurora*, 69 F.3d 441, 452-53 (10th Cir. 1995), the Tenth Circuit stated *en banc* that:

> a civil rights plaintiff may withstand a motion for summary judgment and is entitled to present his claim to the fact finder if the plaintiff establishes a *prima facie* case and presents evidence that defendant's proffered nondiscriminatory reason was pretextual — i.e., unworthy of belief.

Thus, evidence of pretext and a *prima facie* case is sufficient to avoid summary judgment for the defendant with out requiring the Plaintiff to produce direct evidence of an illegal discriminatory motive. *See, e.g., Reynolds v. School District No. 1, Denver, Colo.*, 69 F.3d 1523 (10th Cir. 1995) (elements discussed in a reverse discrimination case). Here, the lies told to Premratananont demonstrate pretext. Since Premratananont has clearly met this burden, he is entitled to have his claims proceed to trial.

III.

SUPPLEMENTAL JURISDICTION SHOULD BE EXERCISED.

Because Premratananont is entitled to move forward on his federal claim, as set forth above, supplemental jurisdiction is proper pursuant to 28 U.S.C. § 1367. This is because the federal claim predominates over his state law claim, also of ethnic and racial discrimination in his treatment by the District, there is no

novel or complex issue of state law, nor are there any compelling reasons for declining jurisdiction. *See id.*

CONCLUSION

Wherefore, for all of the foregoing reasons, Petitioner respectfully requests the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter, since the court below, as well as the United States District Court for the District of Colorado, erred in granting summary judgment in this action and dismissing the state law claim of discrimination by declining to exercise supplemental jurisdiction.

Respectfully submitted,

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LAW OFFICES OF
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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 30, 1998

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 97-1090
(D.C. No. 96-WY-446-WD)
(Colorado)

NICK PREMRATANANONT,

Plaintiff-Appellant,

SOUTH SUBURBAN PARK AND RECREATION DISTRICT, a special district,

Defendant-Appellee.

ORDER AND JUDGMENT

Before **SEYMOUR,** Chief Judge, **ANDERSON and LUCERO,** Circuit Judges.

Nick Premratananont, who is Asian, brought suit against South Suburban Park and Recreation District (South Suburban) alleging constructive discharge based on his race/national origin in violation of Title VII and state law. The district court granted South Suburban's motion for summary judgment. Mr. Premratananont appeals, and we affirm.

Plaintiff was hired by South Suburban to do custodial work and minor repairs in July 1981. He was promoted twice on the

recommendation of his then supervisor Bob Pfeiffer, ultimately obtaining the position of Lead Facility Maintenance Specialist at the Goodson Recreation Center.

In May 1994, Mr. Pfeiffer resigned and Kim Lathrop became plaintiff's new supervisor. In September, South Suburban posted a job opening for Supervisor of Preventative Maintenance. Although plaintiff met the minimum qualifications listed for the position and submitted an application along with fifty-one other persons, he was not granted an interview. Kevin Greene, manager of South Suburban's recreational facilities, was responsible for selecting the interviewees. Mr. Greene stated in his deposition that he did not choose plaintiff because plaintiff had no experience managing multiple sites and because Ms. Lathrop had informed him she was having problems with plaintiff's work performance.

On September 29, 1994, plaintiff requested that Ms. Lathrop ask Mr. Greene why he had not been chosen for an interview. Later in the day, Ms. Lathrop gave plaintiff a memorandum, dated September 29, 1994, stating that she and plaintiff had discussed his poor work performance "numerous times" in the past, and "if improvement [was] not seen in 90 days this could lead to suspension and termination." Aplt. App. at 336. Ms. Lathrop indicated to plaintiff that concerns with his work may have been one of the reasons why plaintiff was not selected for an interview. Upset by Ms. Lathrop's memorandum, plaintiff requested and was granted sick leave. While on leave, plaintiff received treatment for depression and anxiety and found employment elsewhere. Plaintiff resigned from his position at South Suburban on December 6, 1994.

In accordance with South Suburban's internal grievance procedure, plaintiff wrote a letter of grievance to Mr. Greene

requesting written justification for his exclusion from the interview process. Mr. Greene responded that plaintiff was not interviewed because he did not have the same knowledge and experience as the other top candidates. Plaintiff appealed Mr. Greene's decision to the personnel office, but resigned before the appeal process could be completed.

We review the grant or denial of summary judgment de novo. Summary judgment is appropriate if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Seymore v. Shawyer & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-48 (1986). When applying this standard, we view the evidence in the light most favorable to the nonmoving party. *Seymore*, 111 F.3d at 797.

Because plaintiff relies on circumstantial evidence to demonstrate South Suburban's discriminatory intent, we must apply the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). The first step of the *McDonnell Douglas* analysis places the burden on plaintiff to establish a prima facie case of discrimination. *See Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1533 (10th Cir. 1995). In the context of a constructive discharge claim based on racial discrimination, plaintiff must show: (1) he is a minority; (2) he was performing satisfactory work or was qualified to do the job; (3) defendant subjected him to working conditions that a reasonable person would view as intolerable because of his race; and (4) his position was filled by a non-minority. *Id.* at 1334;

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 529 (10th Cir. 1994). The district court held plaintiff failed to establish the third element of constructive discharge, and therefore failed to present a prima facie case of discrimination under Title VII. The court dismissed the state law claims without prejudice, declining to exercise supplemental jurisdiction.

Constructive discharge occurs when a reasonable person in the employee's position has essentially "no other choice but to quit." *Yearous v. Niobrara County Mem'l Hosp.,* 128 F.3d 1351, 1356 (10th Cir. 1997) (internal quotation marks and citation omitted). The typical constructive discharge claim alleges that an employer created a hostile work environment which rendered working conditions intolerable. Constructive discharge claims may also be based on other types of intolerable working conditions such as retaliatory conduct for making a complaint of discrimination, *see Woodward v. City of Worland,* 977 F.2d 1392, 1402 (10th Cir. 1992), or a failure to promote for discriminatory reasons, *see Irving v, Dubuque Packing Co.,* 689 F.2d 170, 171-72 (10th Cir. 1982). However, "[a] finding of constructive discharge must not be based only on the discriminatory act; there must also be aggravating factors that make staying on the job intolerable." *James v. Sears Roebuck,* 21 F.3d 989, 992 (10th Cir. 1994); *see also Irving,* 689 F.2d at 172-73. Examples of "aggravating factors" might include perceived demotion or reassignment to a job with lower status or lower pay, depending on the individual circumstances of each case. *James,* 21 F.3d at 993. Courts must therefore examine the "totality of the circumstances." *Yearous,* 128 F.3d at 1356.

Plaintiff bases his constructive discharge claim on discriminatory treatment, failure to promote, and retributive conduct. The record reveals no indication that Ms. Lathrop treated

plaintiff differently, or that Mr. Greene denied him an interview, because of his race; nor does it reveal any aggravating factors which created conditions that were so intolerable a reasonable person would feel compelled to resign. The extent of plaintiff's allegations of differential treatment by Ms. Lathrop include walking around the Goodson Recreation Center with plaintiff pointing out tasks that needed to be completed and requiring plaintiff to clear vacation days and doctors' visits with her, while not demanding the same of Mr. Blevins, a supervisor of another recreation center; excluding plaintiff from a walk around the Goodson facility with Mr. Blevins and another supervisor; and telling plaintiff she trusted Mr. Blevins more than him. Aplt. App. at 45-46, 61-62. Ms. Lathrop never yelled at plaintiff, called him any names, or insulted him. Aplt. App. 68-70.

We find plaintiff's allegations of discriminatory conduct by Mr. Greene equally unavailing. Fifty-two persons applied for the position. Many of the applicants, like plaintiff, met the minimum qualifications but were not granted interviews. Mr. Greene established objective criteria to narrow the field of potential interviewees. One such criterion was the management of multiple sites, experience which plaintiff admitted he did not possess. Don Pettit, who was ultimately hired for the position, often filled in during vacations and sick leaves for the outgoing Supervisor of Preventative Maintenance. Moreover, South Suburban had promoted plaintiff twice in the past, and plaintiff never received any pay cut or lower status assignments as a result of being denied for the promotion. Plaintiff has failed to show that Ms. Lathrop's and Mr. Greene's conduct was motivated by racial animus; he therefore cannot claim he was "forced to quit because of race-based, intolerable conditions." *Bolden v. PRC. Inc.*, 43 F.3d 545, 552 (10th Cir. 1994).

Plaintiff further contends he was constructively discharged as a result of Ms. Lathrop's retaliatory conduct in response to his complaints as to why he was not granted an interview. Plaintiff specifically alleges Ms. Lathrop made up lies about his work performance and about raising such concerns with him on numerous occasions, and threatened him with termination if his performance did not improve.[1] One factor we consider in determining the voluntariness of a plaintiff's decision to resign is "whether the employee was given some alternative to resignation." *Yearous,* 128 F.3d at 1356 (internal quotation marks and citation omitted). Here, plaintiff did not utilize South Suburban's internal grievance procedure to contest Ms. Lathrop's allegedly fabricated and undeserved negative performance evaluations of him or the ninety-day warning of termination. Plaintiff only filed a grievance regarding his failure to obtain an interview, and resigned before the appeal of this issue was completed. Our review of the record persuades us that the conditions were not so serious that a reasonable employee in plaintiff's position would have resigned before pursuing South Suburban's internal grievance procedures. *See id.* at 1357 (nurses who chose to forego filing an internal grievance with hospital's personnel committee could not prove their resignation was involuntary where conditions were not sufficiently serious and reasonable alternative to resignation existed); *Boze v. Branstetter,* 912 F.2d 801, 805 (5th Cir. 1990) (per curiam) (more appropriate response to being passed over for promotion or receiving a negative performance evaluation

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1. The issue of whether Ms. Lathrop fabricated such allegations is highly disputed by the parties. This factual dispute, however, does not "affect the outcome of the suit," and therefore does not "properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) Even assuming September 29 was the first time Ms. Lathrop mentioned plaintiff's poor work performance to him, as we discuss *infra,* we still conclude plaintiff was not constructively discharged.

would have been to pursue internal grievance procedures rather than quit).

In sum, the record contains no evidence that plaintiff was treated differently or denied the promotion because of his race. Nor is there any evidence of aggravating factors which made conditions intolerable. Finally, plaintiff had a reasonable alternative to resignation. Plaintiff has failed to meet his burden of establishing a prima facie case of discrimination.

We **AFFIRM** the order of the district court.

SUBMITTED FOR THE COURT

Stephanie K. Seymour
Chief Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED MARCH 5, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-446-WD

NICK PREMRATANANONT,

Plaintiffs,

v.

SOUTH SUBURBAN PARK AND RECREATION DISTRICT,

Defendants.

JUDGMENT

Pursuant to the order on defendant's motion for summary judgment, entered by Judge William F. Downes on January 31, 1997, it is

ORDERED AND ADJUDGED that judgment is entered for the defendant and against the plaintiff on the first claim for relief and that claim is dismissed. The remaining claims in the complaint and this civil action are dismissed without prejudice. Defendant shall have its costs upon the filing of a bill of costs within ten days.

DATED: March 5, 1997

Appendix B

JAMES R. MANSPEAKER, CLERK

By s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED JANUARY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-446-WD

NICK PREMRATANANONT,

Plaintiff,

vs.

SOUTH SUBURBAN PARK AND RECREATION DISTRICT,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's oral findings as stated on the record during a telephone conference hearing held January 29, 1997, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's First Claim for Relief which is therefore DISMISSED; it is further

ORDERED that the Court declines to exercise supplemental jurisdiction as to Plaintiff's state law claim under the Colorado Anti-Discrimination Act; therefore, Plaintiff's Second Claim for Relief is DISMISSED WITHOUT PREJUDICE.

Appendix C

DATED this 31st day of January, 1996.

s/ [illegible]
United States District Judge

APPENDIX D — TRANSCRIPT OF ORAL RULING DATED JANUARY 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-446-WD
January 29, 1997
Volume I of I

NICK PREMRATANANONT,

Plaintiff,

vs.

SOUTH SUBURBAN PARK AND RECREATION DISTRICT, a Special District,

Defendant.

TRANSCRIPT OF ORAL RULING

Transcript of Telephone Hearing Proceedings on the above-entitled case before the Honorable William F. Downes, Judge, commencing at 11:20 a.m. on the 29th day of January, 1997

* * *

PROCEEDINGS

[3] THE COURT: Good morning. This is Judge Downes.

MR. McKENDREE: Good morning, Your Honor. This is John McKendree for the Plaintiff.

Appendix D

MR. FISHER: Good morning, Your Honor. This is Andy Fisher, in place of Andy Nathan, for the Defendant.

THE COURT: All right. Good morning, Counsel.

The court is in session in the matter of Premratananont versus South Suburban Park and Recreation District, Case 96-WY-446-WD, for an oral ruling on the Defendant's Motion for Summary Judgment.

The Court, having carefully considered the oral argument of the parties, the memoranda of law and attachments, including affidavits and other materials proffered in support and in opposition to the Motion for Summary Judgment, finds as follows:

Background:

This action involves the alleged discrimination against Plaintiff because of his race or national origin as an Asian, being born in Bangkok, Thailand, of parents of Chinese descent. Plaintiff raises claims under Title VII and the Colorado Anti-Discrimination Act. The basis of the Plaintiff's claims are that, while employed by Defendant, he was subjected to different treatment and denied a promotional interview because of his race or ethnicity.

[4] The record reflects the Plaintiff began his employment with the Defendant District in July of 1981 as a Maintenance Specialist I. In 1984 and again in 1988 or in 1989, apparently upon the recommendation of his previous supervisor, Bob Pfeiffer, Plaintiff was promoted to lead Facility Maintenance Specialist at the Goodson Recreation Center, which is the position he held at all times relevant to the complaint. In this position, Plaintiff was a leadman over a crew of employees. Plaintiff asserts that during

his employment, he performed his duties in a competent and workmanlike manner.

On or about September 11, 1994, the District posted the position for Supervisor of Preventative Maintenance for which Plaintiff applied. The Position Description set forth certain minimum qualifications — put quotes around that — which Plaintiff met. The second and third pages of the Position Description, which are not generally posted for employee review, also included an experience requirement of two years' supervisory experience as a leadman or foreman. Kevin Greene, who was in charge of choosing those applicants to be interviewed, did not choose Plaintiff for an interview. Greene asserts that the primary reason for not choosing Plaintiff was because he was looking for someone with experience in management of multiple sites. See Greene deposition at 99. Plaintiff [5] argues that this reason is plainly pretextual because the Position Description does not list such a requirement. Plaintiff also submits the opinions of his former supervisor and JoAnn Phillipp that he was qualified for the position. Plaintiff asserts that he exceeded the minimum qualifications in addition to having 13 years with the District.

Another reason that Mr. Greene said he considered not selecting Plaintiff for an interview was his awareness that Plaintiff's new supervisor, of only a few months, was having some difficulty with the Plaintiff. Mr. Greene admitted that Plaintiff met the minimum qualifications for the position. In his deposition, Greene stated, quote,

> The different applicants had different strengths in different areas. I needed someone who had some specific skills who could then supervise other skilled tradesmen who would be going around and doing

> the work at any location within the district. They would — oh, excuse me. They should have overall knowledge of those different areas, close quote.

Greene deposition at 100. With respect to the process he went through in determining who to interview, Greene stated he first made three piles, one of those having strong [6] qualifications, another for those who seemingly met the minimum qualifications, and another for those who did not meet the minimum qualifications. Greene then stated, quote,

> That in itself isn't enough to narrow it down, because there are lots of people that apply that meet the minimum qualifications. Then I start to redefine out of this list of yes and maybe who is the most qualified, who has the strongest qualifications for the position. And then I use that to help me determine what persons I'll be interviewing.

Greene deposition at 102.

Plaintiff alleges that three members of the interview panel told him they were unaware that he had applied for the job, and one of the members told him he was more qualified than some of the people who were interviewed. Plaintiff asserts that Greene was aware of his Asian status because he had discussed it with other supervisors and noted it on their various forms. Plaintiff also asserts that Don Petitt had only been with the district for 18 months prior to the interview and that three other interviewees had no experience working for the district in maintenance. Defendant, however, stated that Petitt had had experience in managing multiple [7] facilities and had in fact filled in for the outgoing Supervisor of Preventative Maintenance.

Appendix D

Plaintiff also disputes that he was ever told by his new supervisor, Kim Lathrop, about any performance problems. Plaintiff argues that the evidence is material — excuse me. Let me say that again. Plaintiff argues that the evidence is in material dispute as to whether there were in fact any performance problems that affected Plaintiff's failure to have an interview; whether or not the alleged performance problems were pretextual and manufactured after the fact; and whether or not any such alleged problems were a reason for discrimination at issue. As to discriminatory treatment, the essence of the Plaintiff's allegation is that Kim Lathrop, who, parenthetically, was the Plaintiff's supervisor for about four months prior to his resignation, treated him differently than she treated Ernie Blevins, who was the leadman at the Sheridan Recreation Center. In this regard, Lathrop allegedly trusted Ernie more than Plaintiff; allegedly, she did not include Plaintiff in walking around the Goodstein — the Goodson Center and the Sheridan Recreation Center for inspections and training; and she allegedly required Plaintiff to seek permission to go to his physician while not making Blevins and other employees secure such permission. Plaintiff also alleges that [8] Lathrop knew he was applying for the new position and made certain he did not get an interview. Therefore, Plaintiff argues that the stated reason for not giving him an interview were a pretext for racial discrimination and that was constructively discharged.

Plaintiff is alleging causes of action under Title I and the Colorado Anti-Discrimination Act for discriminatory treatment and constructive discharge. In is Complaint, Plaintiff bases his Title VII claim on the allegation that the Defendant, quote, discriminated against him in the terms and conditions of his employment on the basis of his race and ethnicity, close quote; Complaint at paragraph 43. It is apparent from a review of the record that Plaintiff's Title VII claim revolves around alleged

discriminatory treatment and constructive discharge. Although Plaintiff applied for a, quote, promotion, close quote, it does not appear that the Plaintiff Complaint includes a specific failure — or claim for, quote, failure to promote, close quote. Rather, Plaintiff asserts that the Defendant's failure to grant him an interview for the position was a factor which, along with the differential treatment by his supervisor, contributed to his constructive discharge.

Plaintiff's claim under the Colorado Anti-Discrimination Act is more focused on the allegation [9] that he was denied an interview for the position of Supervisor of Preventative Maintenance due to his race and ethnicity; Complaint at paragraph 46.

Standard of Review:

The standard of review on Rule 56 motions is well established. By its very terms, the standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact. Anderson versus Liberty Lobby, 477 U.S. 242, 247, and 248, 1986.

The trial court decides which facts are material as a matter of law. Quote, Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. While the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs, close quote. Id. at 248; see also Carey versus United States Postal Service, 812 F.2d 621, 623, Tenth

Circuit, 1987. The relevant inquiry is, quote, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law, close quote. Id. at 623. [10] In considering a party's motion for summary judgment, the Court must examine all evidence in the light most favorable to the nonmoving party. Barber versus General Electric Company, 648 F.2d 1272, 1276, note 1, Tenth Circuit, 1981. However, quote, when a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial, close quote. Federal Rule of Civil Procedure 56(e).

The Discussion:

Plaintiff does not present direct evidence of intentional discrimination based on his race and ethnicity. Thus, this Court must apply the burden-shifting framework outlined in McDonnell Douglas Corporation versus Green, 411 U.S. 792, 1973, to evaluate whether Plaintiff has demonstrated Defendant's discriminatory intent through circumstantial evidence. Cone versus Longmont United Hospital Association, 14 F.3d 526, 529, 1994; and Reynolds versus School District Number 1, 69 F.3d 1523, 1533, 1995.

Quote, Under the McDonnell Douglas scheme, in order to survive summary judgment on a circumstantial case, the plaintiff must first establish a prima facie case of discrimination. . . . If the plaintiff carries that burden, [11] the burden shifts to the defendant to articulate a facially nondiscriminatory reason for the challenged employment action. . . . If the defendant makes such

a showing, the burden reverts to the plaintiff to prove that the proffered nondiscriminatory reason is pretextual, from which a jury infer discriminatory *intent.*
Reynolds, 69 F.3d at 1534, citations omitted.

To establish a prima facie case of race/ethnic discrimination for a constructive discharge claim, Plaintiff must show that (1) he belongs to a minority (2) he was doing satisfactory work and/or was qualified to do his job; (3) Defendant subjected him to working conditions that a reasonable person would view as intolerable, while not so treating members of a different race or ethnicity; and (4) his position was filled with a non-minority. Id. and Cone, 14 F.3d at 529.

At least at this stage of the proceedings, it is essentially undisputed that the Plaintiff has provided sufficient evidence to establish the first, second, and fourth elements of his prima facie case. However, Plaintiff has not established the third element. To establish that he was constructively discharged, Plaintiff must show that he was forced to quit due to race-based intolerable working conditions that would have forced a reasonable employee to quit. Reynolds, 69 F.3d at 1534. [12] Although Plaintiff has provided evidence of certain instances of differential treatment from his supervisor of only four months, along with the Defendant's failure to grant him an interview for the position of Supervisor of Preventative Maintenance, such evidence is insufficient to show that the Defendant made working conditions so difficult that a reasonable person in the Plaintiff's position would feel compelled to resign. James versus Sears, Roebuck and Company, Inc., 21 F.3d 989, 992, Tenth Circuit, 1994. Because Plaintiff has not made out a prima facie case for a constructive discharge claim, his First Claim for Relief must be dismissed.

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Therefore, it is ordered that the Defendant's Motion for Summary Judgment is granted as to Plaintiff's First Claim for Relief.

It is further ordered that this Court declines to exercise supplemental jurisdiction as to the Plaintiff's state law claim under the Colorado Anti-Discrimination Act; therefore, Plaintiff's Second Claim for Relief is dismissed without prejudice. So ordered.

All right. Counsel, if either party would like a copy of the transcript — the Order will be a one-page order incorporating, by reference, my oral findings. And if either counsel would like a copy of these oral findings, you can make arrangements with the court reporter, who will [13] talk to you about that as soon as I conclude this hearing.

Any questions from either counsel?

MR. FISHER: Judge, this is Andy Fisher. Just so I understand, you are going to do an Order? You don't want us to do a form of order for you?

THE COURT: That's right. I'll do the order.

MR. FISHER: All right. Thank you.

THE COURT: All right. Anything else, gentlemen?

MR. McKENDREE: Plaintiff has nothing further, Your Honor.

MR. FISHER: Nothing for the — nothing for the Defendant.

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THE COURT: All right. Thank you, Counsel. Have a good day.

MR. McKENDREE: Thanks. Good-bye.

(The hearing proceedings were adjourned at 11:35 a.m., January 29, 1997.)